



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 16, 1998

Ms. Tina Plummer
Open Records Coordinator
Texas Department of Mental Health
and Mental Retardation
P.O. Box 12668
Austin, Texas 78711-2668

OR98-2724

Dear Ms. Plummer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 119535.

The Texas Department of Mental Health and Retardation (the "Department") received a request for copies of the winning bids submitted in response to requests for proposals for "S/390 Enterprise Main Server", "Switched Ethernet Hardware", "Project Phoenix" and "Enterprise Server Hardware" projects. You assert that some of the responsive information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. You claim that a responsive bid submitted by IBM contains information supplied by a subcontractor, Data Storage Marketing, Inc, and that disclosure of this information would infringe on the confidentiality interest of this subcontractor. You have supplied copies of the information you seek to withhold. As provided by section 552.305 of the Open Records Act, this office provided IBM the opportunity to submit reasons why the information at issue should be withheld. In correspondence to this office, IBM contends that the subject information is excepted from disclosure pursuant to sections 552.101 and 552.110 of the Government Code. We have considered the exceptions raised and the information at issue.

Section 552.101 excepts information considered confidential by law, including information made confidential by statute. Section 6103(a) of title 26 of the United States Code provides that tax return information is confidential. Thus, the federal income tax information contained in the submitted documents must be withheld from disclosure. It has been marked accordingly.

Section 552.101 also protects information that is protected by constitutional or common-law privacy rights. However, those considerations are inapplicable here, as privacy rights do not protect business interests. Open Records Decision No. 192 at 4 (1978) (right of privacy protects feelings of human beings, not property, business or other monetary interests); *see* Open Records Decision No. 373 at 3 (1983) (privacy interest in financial information relating to individual).

Business interests may be protected under Section 552.110 of the Government Code. This section excepts information of two types (1) trade secrets, and (2) commercial or financial information that is obtained from a person and made privileged or confidential by statute or judicial decision. Open Records Decision No. 592 at 2 (1991). No trade secret argument has been raised, however the latter category is relevant to the information at issue.

In Open Records Decision No. 639 (1996), this office announced that its analysis of arguments raised under the "commercial or financial information" provision of section 552.110 would follow the federal courts' interpretation of Freedom of Information Act exemption 4. Federal courts hold that information is confidential if release would (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks and Conservation Ass'n. v. Morton*, 498 F.2d 765 (D.C.Cir.1974).

A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 at 4 (1996). To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. *Id.* The only argument presented in support of the commercial harm prong is IBM's statement: "it is IBM's belief that such harm will result." This is mere conclusion and will not support the competitive harm prong of the *National Parks* test. Turning to the impairment prong, where information is required for a bid or contract, its disclosure cannot be said to be an impairment to government's ability to solicit future bids. *See Martin Marietta Corp. v. Dalton*, 974 F.Supp.37(D.D.C. 1997) (no impairment where information was required for bid or contract "contractors will continue bidding for agency contracts despite the risk of revealing business secrets if the price is right"). As the subject information was provided for the purpose of obtaining a bid or contract; the impairment prong of the *National Parks* test is not met.

We conclude that the exception to disclosure under section 552.110 of the Government Code has not been sufficiently supported and therefore none of the submitted information may be withheld pursuant to that section.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue

under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/ch

Ref: ID# 119535

Enclosures: Submitted documents

cc: Ms. Kimberly Hanks
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(w/o enclosures)